YAP TECK NGIAN A

v.

YAP HONG LANG & ORS

FEDERAL COURT, PUTRAJAYA B
ALAUDDIN MOHD SHERIFF FCJ
NIK HASHIM FCJ
HASHIM YUSOFF FCJ
[CIVIL APPEAL NO: 02-34-2006 (C)]
8 AUGUST 2007 C

CIVIL PROCEDURE: *Administration of estates - Letter of administration - Revocation - Citation - Proper procedure for filing - Whether by way of summons in chambers - Whether by way of praecipe together with verifying affidavit - Rules of High Court 1980, O. 72 rr. 7, 8(2), 18* D

The respondents had sought to file a writ to revoke the grant of a letter of administration of the estate of the deceased to the appellant. To meet the condition precedent for the writ, the respondents applied for a citation under O. 72 r. 7 Rules of the High Court 1980 ('RHC') and filed a praecipe together with a verifying affidavit for the issuance of the citation pursuant to O. 72 r. 8(2) RHC. The appellant argued that the respondents ought to have proceeded by way of summons under O.72 r. 18 RHC, and not *vide* O. 72 r. 8(2) aforesaid, and in the circumstances applied to set aside the citation. Both the High Court and the Court of Appeal however affirmed the respondents' manner of applying for citation as correct, and had dismissed the appellant's appeals to them. Being dissatisfied, the appellant appealed further and posed the following question to the apex court, namely, "whether a citation under O. 72 r. 7 RHC can be issued against a representative of the deceased holding a grant of a letter of administration merely by filing a praecipe together with an affidavit verifying the facts without filing any formal application by way of a summons in chambers." E F G H

Held (dismissing the appeal):
Per Nik Hashim FCJ delivering the judgment of the court

(1) Order 72 r. 7 RHC makes it clear that before the respondents/citors could file a writ for the revocation of the grant of a letter of administration, a citation against the person to whom I

A the letter was granted, namely the appellant/citee, must be issued requiring him to bring into and leave at the Court Registry the letter of administration. It is also clear from the words of O. 72 r. 8(2) that before such citation is issued, an affidavit verifying the statements of fact to be made in the B citation must be sworn by the citors and that the citation must be served personally on the citee. On the facts, the respondents had complied with all these requirements. (para 6)

(2) We agree with the respondents that a summons in chambers C is a process used in an interlocutory application which can only be filed in a pending cause or matter. In the present case, however, the writ for the revocation of the grant for the letter of administration has yet to be filed in court and as such, there is no pending cause or matter in the court in D which a summons in chambers could properly issue. Further, the use of praecipes as an application to be filed together with an affidavit is nothing new to the RHC, as exemplified by O. 70 r. 4(3) and O. 71 r. 41 thereof. Consequently, considering that the manner of application is specifically E provided for in the RHC, it is only proper that the r. 8(2) procedure be complied with. (paras 7 & 8)

(3) The High Court and the Court of Appeal were thus right in saying that the correct procedure for the issuance of a citation is as provided in O. 72 r. 8(2) RHC, and that the application F of O. 72 r. 18 is by its own terms excepted. Consequently, we would answer the question posed in the affirmative and dismiss the appeal. (paras 10 & 11)

Bahasa Malaysia *translation of headnotes*

G

Responden-responden berhasrat untuk memfail writ bagi membatalkan surat kuasa mentadbir yang diberikan kepada perayu untuk mentadbir pusaka si mati. Bagi memenuhi syarat duluan writ, responden-responden memohon mendapatkan sitasi di bawah H A. 72 k. 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan seterusnya memfailkan praecipe beserta dengan afidavit menentusah bagi pengeluaran sitasi berkenaan di bawah A. 72 k. 8(2) KMT. Perayu berhujah bahawa responden-responden sepatutnya menggunakan prosedur saman di bawah A. 72 k. 18 KMT, dan I tidak A. 72 k. 8(2) di atas, dan dengan itu memohon supaya sitasi diketepikan oleh mahkamah. Kedua-dua Mahkamah Tinggi dan

Mahkamah Rayuan, bagaimanapun, mengesahkan cara permohonan sitasi responden-responden adalah betul, sekaligus menolak rayuan-rayuan perayu. Tidak berpuas hati, perayu merayu selanjutnya dan mengemukakan persoalan berikut kepada mahkamah tertinggi, iaitu "sama ada satu sitasi di bawah A. 72 k. 7 KMT boleh dikeluarkan terhadap seorang wakil diri si mati yang memegang surat kuasa mentadbir hanya dengan memfail praecipe dan afidavit menentusahkan fakta tanpa memfailkan sebarang permohonan formal melalui satu saman dalam kamar."

Diputuskan (menolak rayuan):
Oleh Nik Hashim HMP menyampaikan penghakiman mahkamah

(1) Berdasarkan A. 72 k. 7 jelas bahawa sebelum responden-responden/citor boleh memfail writ bagi membatalkan geran surat kuasa mentadbir, sitasi hendaklah terlebih dahulu dikeluarkan terhadap orang yang diberi surat kuasa mentadbir tersebut, iaitu perayu/citee, mengkehendakinya membawa dan meninggalkan surat kuasa mentadbir di Pejabat Pendaftaran Mahkamah. Juga jelas dari peruntukan A. 72 k. 8(2) bahawa sebelum sitasi berkenaan dikeluarkan, suatu afidavit menentusahkan nyataan fakta yang akan dibuat di dalam sitasi hendaklah diikrar oleh citor dan sitasi tersebut hendaklah juga disampaikan kepada citee secara kediri. Di atas fakta, semua keperluan-keperluan ini telah disempurnakan oleh responden-responden.

(2) Kami bersetuju dengan responden-responden bahawa saman dalam kamar adalah satu proses yang digunakan di dalam permohonan interlokutori dan hanya boleh difailkan di dalam satu perkara atau kausa yang pending. Bagaimanapun, di dalam kes semasa, writ bagi membatalkan geran surat kuasa mentadbir masih belum difailkan di mahkamah dan dengan itu, tidak wujud apa-apa perkara atau kausa yang pending di mana suatu saman dalam kamar boleh dengan wajarnya dikeluarkan. Selain itu, penggunaan praecipe sebagi suatu permohonan yang akan difail bersama-sama dengan afidavit menentusah bukanlah satu perkara baru kepada KMT, seperti yang ternyata dari A. 70 k. 4(3) serta A. 71 k. 41 KMT. Oleh yang demikian, memandangkan bahawa cara membuat permohonan telah diperuntuk secara khusus di dalam KMT, maka adalah wajar bahawa prosedur k. 8(2) di sini dipatuhi.

(3) Mahkamah Tinggi dan Mahkamah Rayuan dengan itu betul dalam menyatakan bahawa prosedur sebenar bagi pengeluaran sitasi adalah seperti yang diperuntukkan oleh A. 72 k. 8(2) KMT, dan bahawa pemakaian A. 72 k. 18 atas peruntukannya sendiri adalah dikecualikan. Dengan itu kami menjawab persoalan yang dikemukakan dalam bentuk afirmatif sekaligus menolak rayuan.

Case(s) referred to:
In re Sin Teck Hong Oil Mills Limited [1950] 16 MLJ 232 ***(refd)***
Ratnam v. Cumarasamy & Anor [1965] 31 MLJ 228 PC ***(refd)***
Yap Teck Ngian v. Yap Hong Lang & Ors [2006] 4 CLJ 492 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 32 r. 1, O. 70 r. 4(3), O. 71 r. 41, O. 72 rr. 1(2), 2(1), 7, 8(1), (2), 18

Other source(s) referred to:
Kanesh Sundrum, *Administration of Estates Handbook,* p 187, para 192

For the appellant - K Maniam; M/s Skrine
For the respondents - Jagjit Singh (Francis Tan with him); M/s Rosni, Francis Tan & Ho

[Appeal from Court of Appeal; Civil Appeal No: C-02-1039-2001]

Reported by WA Sharif

JUDGMENT

Nik Hashim FCJ:

The Question

[1] On 20 June 2006, this court granted leave to appeal on the following question:

> Whether a citation under O. 72 r. 7 of the Rules of the High Court 1980 (the RHC) can be issued against a representative of the deceased holding a grant of a letter of administration merely by filing a praecipe together with an affidavit verifying the facts without filing any formal application by way of a summons in chambers.

Background

[2] The appellant, the administrator of the estate of his late father (the deceased), was the citee while the respondents, the brothers and sisters of the deceased, were the citors. The appellant had been granted a letter of administration for the estate of the deceased; the respondents, claiming that the said grant of the letter was defective, disclosed that they intended to file a writ against the appellant to cancel or revoke the said grant. For this purpose and as a condition precedent before the said writ could be issued, the citors applied by filing a praecipe together with a verifying affidavit for the issuance of a citation pursuant to r. 8(2) of O. 72 of the RHC, which the learned senior assistant registrar (the SAR) granted on 29 November 2000. On appeal the learned Judicial Commissioner of the High Court affirmed the SAR's decision and dismissed the appellant's application to set aside and cancel the citation. On appeal to the Court of Appeal, the appellant contended that the citation should be set aside as the citation was not applied by way of a summons as required by r. 18 of O. 72 of the RHC. The Court of Appeal held that the manner of applying for the citation is by a praecipe supported by a verifying affidavit as required by r. 8(2) of O. 72 of the RHC and dismissed the appeal (see [2006] 4 CLJ 492). Hence the question before this Court.

[3] Before us, learned counsel for the appellant repeated his submission that an application for citation must be made by way of a summons in chambers. Otherwise, he said it would be an irregularity which cannot be cured and therefore the whole proceeding under the citation would be rendered a nullity and cited O. 72 r. 18 and O. 32 r. 1 of the RHC in support of his submission. Order 72 r. 18 states:

> **Except where these rules otherwise provide,** any application to the Court in a probate cause or matter may be made by summons. (emphasis added)

Whereas O. 32 r. 1 provides:

> Except as provided by Order 25 rule 7, every application in Chambers must be made by summons in Form 62.

He also submitted that in neither r. 7 nor r. 8 of O. 72 is there any provision which allows an *ex parte* application to issue a citation by merely filing a praecipe and affidavit without an application by way of a summons in chambers.

Finding Of This Court

[4] With respect, we do not agree with the appellant.

[5] It must be noted that the instant case is a contentious probate action for the revocation of the letter of administration granted to the appellant under O. 72 r. 1(2) of the RHC. A probate action must be commenced by writ (O. 72 r. 2(1)). For ease of reference the relevant provisions of the RHC pertaining to the manner of applying for the issue of a citation are now reproduced as follows:

O. 72 r. 7 – Citation to bring in grant

In an action for the revocation of the grant of probate of the will, or letters of administration of the estate of a deceased person, a citation against the person to whom the probate or letters of administration, as the case may be, was or were granted requiring him to bring into and leave at the Registry the probate or letters of administration, as the case may be, may be issued on the application of the plaintiff.

O. 72 r. 8 – Citation

(1) A citation under rule 5 or 7 must be issued out of the Registry and must be settled by the Court before it is issued.

(2) *Before such a citation is issued an affidavit verifying the statements of fact to be made in the citation must be sworn by the person applying for it to be issued:*

Provided that the Court may in special circumstances allow the affidavit to be sworn by that person's solicitor.

(3) …

(4) Without prejudice to Order 62 rule 5, a citation under rule 5 or 7 must be served personally on the person cited.

(5) …

(6) …

(7) …

(8) … (emphasis added)

[6] Thus, it is clear from the above provisions that before any person can file a writ for the revocation of the grant of a letter of administration, a citation against the person to whom the letter was granted must be issued to him requiring him to bring into and leave at the Court Registry the letter of administration (O. 72 r. 7). The citation must be settled by the court before it is issued (O. 72 r. 8(1)). Before a citation is issued pursuant to O. 72 r. 7 an affidavit verifying the statements of fact to be made in the citation must be sworn by the person applying for the citation to be issued (O. 72 r. 8(2)) and that the citation must be served personally on the citee which the citors did in the present case. In the *Administration of Estates Handbook*, Kanesh Sundrum states at p. 187 para 192:

> Every probate action must be begun by writ issued out of the Registry of the High Court. The writ must be endorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased. A writ beginning an action for the revocation of probate or administration can only be issued **after** a citation to bring in grant has been issued or the probate or letters of administration has been lodged in the said registry. (emphasis added)

[7] With regard to this case, we agree with learned counsel for the respondents that a summons in chambers is a process used in an interlocutory application which can only be filed in a pending cause or matter. In the present case, the writ for the revocation of the grant of the letter of administration has yet to be filed in court and as such, there is no pending cause or matter in the court in which a summons in chambers could properly issue (see *In re Sin Teck Hong Oil Mills Limited* [1950] 16 MLJ 232).

[8] Further, the use of praecipes as an application to be filed together with an affidavit is nothing new to the RHC. Order 70 r. 4(3) is a good example which provides for the manner of applying for the issue of a warrant of arrest in admiralty proceedings. It states: "A warrant of arrest shall not be issued until the party applying for it has filed a praecipe in Form 157 requesting issue of the warrant together with an affidavit …". See also O. 71 r. 41 where it provides the procedure of applying for a citation in non-contentious probate proceedings by way of an affidavit sworn by the person issuing the citation.

[9] Likewise, O. 72 r. 8(2) provides for the manner of applying for a citation by way of an affidavit in contentious probate proceedings. Considering that the manner of application is specifically provided for in the RHC, it is only proper that the r. 8(2) procedure is to be complied with as after all, the RHC are made to be obeyed (see *Ratnam v. Cumarasamy & Anor* [1965] 31 MLJ 228 PC).

[10] Therefore, in our view, the High Court and the Court of Appeal were right in saying that that was the correct procedure provided by r. 8(2) of O. 72 for the issuance of a citation and that, hence, the application of r. 18 is by its own terms excepted.

[11] In the circumstances, we would answer the question posed in the affirmative. The appeal is dismissed with costs to the respondents and order that the deposit be shared equally to account of their taxed costs.

[12] My learned brothers Alauddin Mohd Sheriff and Hashim Yusoff, FCJJ have seen this judgment in draft and have expressed their agreement with it.